STATE OF MICHIGAN

IN THE SUPREME COURT

SAUGATUCK DUNES COASTAL ALLIANCE,

Plaintiff-Appellant,

v

SAUGATUCK TOWNSHIP; SAUGATUCK TOWNSHIP ZONING BOARD OF APPEALS; and NORTH SHORES OF SAUGATUCK, LLC,

Defendants-Appellees.
/

Supreme Court Nos. 160358, 160359

Court of Appeals Nos. 342588, 346677

Allegan County Circuit Court Nos. 2018-059598-AA, 2017-058936-AA

Hon. Wesley J. Nykamp

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APPELLEE NORTH SHORES OF SAUGATUCK, LLC'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

Appellee North Shores of Saugatuck, LLC does not contest that this Court has jurisdiction to review Appellant Saugatuck Dunes Coastal Alliance's application for leave to appeal from the Court of Appeals' opinion dated August 29, 2019 as the application was filed within 42 days. MCR 7.303(B)(1); MCR 7.305(C)(2).

STATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the same interpretation of the "aggrieved party" standard that has been applied for half a century, given that this term of art was adopted by the Legislature in the Michigan Zoning Enabling Act in 2006 in full view of that longstanding jurisprudence?

Appellant answers: Yes.

Appellee answers: No.

The Court of Appeals answered: No.

The Circuit Court answered: No.

2. Did the lower courts clearly err in concluding that the Coastal Alliance failed to articulate special harms distinct from those suffered by any other property owner arising out of the zoning decision appealed, given that the same harms could be alleged by any neighbor, business, or even tourist, from any development on this residentially zoned property?

Appellant answers: Yes.

Appellee answers: No.

The Court of Appeals answered: No.

The Circuit Court answered: No.

REASONS FOR DENYING THE APPLICATION

Only six months ago, this Court denied leave in *Olsen v Chikaming Township*, declining to review issues practically identical to those raised by Appellant Saugatuck Dunes Coastal Alliance. 325 Mich App 170; 924 NW2d 889 (2018), app den sub nom *Olsen v Jude & Reed, LLC*, 503 Mich 1018; 925 NW2d 850 (2019). Like the appellants in *Olsen*, the Coastal Alliance seeks to overturn nearly half a century of jurisprudence interpreting the term "aggrieved party" in zoning appeals to mean a person who has suffered some special damages not common to other property owners similarly situated. See, e.g., *id.*; see also *Vill of Franklin v City of Southfield*, 101 Mich App 554, 557; 300 NW2d 634 (1980); *W Michigan Univ Bd of Trustees v Brink*, 81 Mich App 99; 265 NW2d 56 (1978); *Unger v Forest Home Twp*, 65 Mich App 614, 617; 237 NW2d 582 (1975); *Joseph v Grand Blanc Twp*, 5 Mich App 566, 571; 147 NW2d 458 (1967). This case fails to present a question of jurisprudential significance deserving of this Court's review for three reasons.

First and foremost, the Coastal Alliance is asking the Court to decide as a matter of judicial policy a question that the Legislature already decided for Michigan when it incorporated the term "aggrieved party" into the Michigan Zoning Enabling Act ("MZEA") in 2006. Like the appellants in *Olsen*, the Coastal Alliance wants the Court to adopt a broader definition of the term than previously existed in Michigan law. It fails to acknowledge, however, that the Legislature already adopted wholesale the half-century of jurisprudence defining who is an "aggrieved party" when it enshrined that term in the MZEA. It cannot be presumed that the Legislature's use of this term is mere happenstance. Rather it must be presumed that the Legislature used this well-seasoned term of art precisely because a wealth of jurisprudence comes with it. The

legislative policy decision to preserve this pre-existing limitation on who can appeal a zoning decision is not subject to judicial review and cannot be overridden.

In addition, the Court of Appeals did not clearly misapprehend or misapply the well-established "aggrieved party" standard. The Coastal Alliance claims that Appellee North Shores of Saugatuck, LLC's ("NorthShore") zoning approvals for a private marina and a Planned Unit Development ("PUD") of 23 single-family-home lots around a boat basin uniquely harm its members by altering the natural beauty of the property and its habitat, reducing their recreational use of the river due to increased boat traffic, and diminishing the economic value of their property due to a change in viewshed and river traffic. As the Court of Appeals correctly observed, these incidental aesthetic, environmental, recreational, and economic harms are not dissimilar to the harms that any neighbor, local business, or tourist could allege.

Finally, this case serves as a decidedly poor vehicle for reaching the issues that the Coastal Alliance has raised. To invoke the circuit court's appellate jurisdiction as an aggrieved party, the Coastal Alliance must not only show its harms are special, but also that they arise from the zoning approvals it has appealed. The Coastal Alliance's alleged harms do not. Diminishing the natural habitat, altering the viewshed, and increasing river traffic would result from any development of this residentially zoned property, even development allowed as a matter of right and requiring no zoning approval. These alleged harms therefore have nothing to do with the Township's specific decision to approve a PUD-style development or a marina, but instead arise from the fact that the property is being developed. Because the Coastal Alliance cannot satisfy the separate jurisdictional requirement of showing its alleged harms arise from the zoning decisions appealed, the issues raised by the Coastal Alliance lack significance not only to the jurisprudence of the state, but also to the outcome of this case.

For all of the reasons given above, the Court should deny the Coastal Alliance's application.

COUNTER-STATEMENT OF FACTS

The parties

In January of 2017, NorthShore purchased the 300-plus acres sitting directly north of the Kalamazoo River channel from Singapore Dunes, LLC (the "NorthShore Property") (the "green" line on the figure below). (8/9/18 NorthShore's Circuit Court Br, Case No. 2018-059598-AA, at 8.) This appeal involves only a small portion of the NorthShore Property known as the Harbor Cluster currently zoned R-2 (residential) (the "light blue" area in the figure below).

(Ex A to NorthShore's COA Br, Case No. 346679.) Uses such as single- and two-family homes, churches, community buildings, farming operations, accessory buildings, and shared waterfront access properties are all permitted within the R-2 district without any special approval. (11/30/17 Administrative Record ("AR") 33.) As is shown on the figure above, there are seven building sites along Lake Michigan (the "Lake Cluster") and eight building sites along the channel (the "Channel Cluster"). Neither of these "clusters," nor the "laydown area" complained

about in the Coastal Alliance's brief, nor any of the other more than 250 acres comprising the NorthShore Property, are part of the PUD which is the focus of this appeal.

The Coastal Alliance is a coalition of individuals and organizations formed to "protect and preserve the natural geography, historical heritage and rural character of the Saugatuck Dunes coastal region in the Kalamazoo River watershed, beginning with the Saugatuck Dunes." (11/30/17 AR 152.) The Coastal Alliance consists of over 2,000 members. (*Id.*)

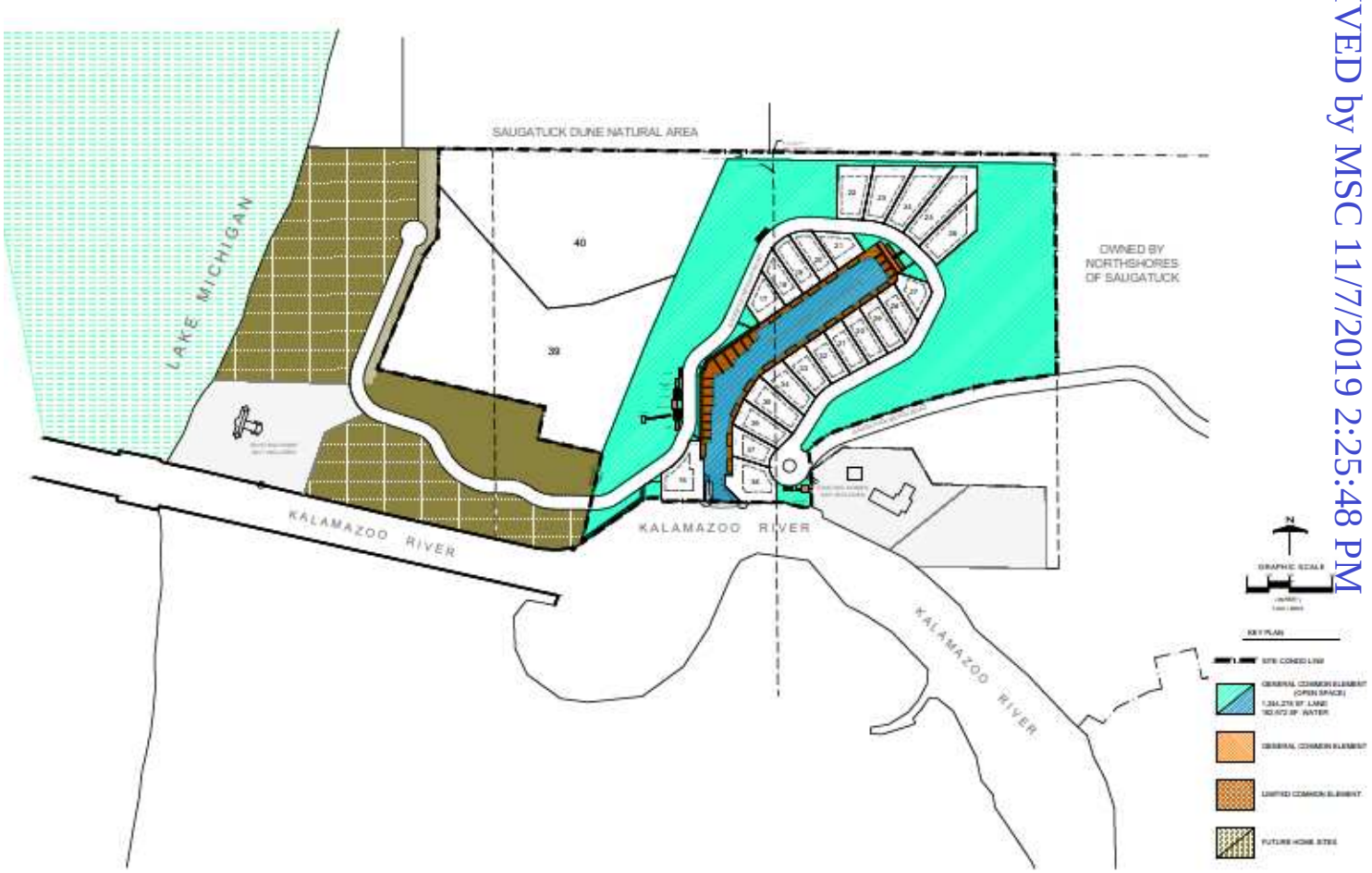
For more than a decade, the Coastal Alliance has opposed every effort to develop the NorthShore Property. The Coastal Alliance has appealed to the Saugatuck Township Zoning Board of Appeals ("ZBA") and the circuit court multiple times, and has initiated contested cases on more than one occasion to challenge approvals by the Michigan Department of Environment, Great Lakes, and Energy ("EGLE").[1] At a Coastal Alliance board meeting on June 27, 2017, the Coastal Alliance accurately described its strategy for opposing development of the NorthShore Property as "death by a thousand paper cuts." (See *id.* at 140.)

Approval of the Planned Unit Development and Special Approval Use

On January 30, 2017, NorthShore submitted an application to the Saugatuck Township Planning Commission for preliminary approval of a planned unit development/site condominium development within the Harbor Cluster area consisting of 23 residential site condominium units and a community building around a boat basin ("PUD"). NorthShore later supplemented its application to also include a request for special use approval for a private marina containing 33 boat slips ("Special Approval Use").[2]

[1] EGLE was formerly known as the Michigan Department of Environmental Quality ("MDEQ").

[2] Marinas are permitted in the R-2 district (and only in this district) as a "special approval use." Saugatuck Twp Ord § 40-1046. (11/30/17 AR 129.)



(11/30/17 AR 340.) Under the Saugatuck Township Zoning Ordinance, and within the same footprint that the PUD and Special Approval Use occupies, NorthShore could have developed 33 residential-home sites (Ordinance § 40-275) and 48 boat slips (Ordinance § 40-908) by right, without obtaining any special approvals from the Planning Commission.[3] (*Id.* at 34, 92-96, 121.) NorthShore sought a PUD approval instead because a PUD provides for a "controlled degree of flexibility" in the layout of residences and open space. (*Id.* at 92.) NorthShore sought the

[3] This calculation of "by right" boat slips does not take into account the additional water frontage that NorthShore's property has on the Kalamazoo River both to the east and west of the PUD footprint.

Special Approval Use so that it could configure boat slips in one centralized location for use of all residents—including those without waterfront lots.

The Planning Commission held three public hearings regarding NorthShore's application on February 28, 2017, March 28, 2017, and April 26, 2017. The Coastal Alliance's members attended and participated in all three of these public meetings.

In opposition to the project, the Coastal Alliance asserted that NorthShore's proposed development was prohibited by the Township's Zoning Ordinance. (11/30/17 AR 154-155.) Among other things, the Coastal Alliance relied on selective portions of Section 40-910(h), which states in full: "In no event shall a canal or channel be excavated for the purpose of increasing the Water Frontage required by this section." (*Id.* at 121.) This anti-funneling section limits the number of docks permitted along "Waterfront Access Property" according to the amount of water frontage. (*Id.* at 119-120.) "Waterfront Access Property" is defined in Section 40-907 as:

> [A] Lot or Parcel or two or more contiguous Lots or Parcels (or condominium units treated as Lots or Parcels), abutting an Inland Waterway or other inland lake or Lake Michigan, used or intended to be used in whole or in part by persons having Shared Waterfront Property Ownership at that location, for gaining pedestrian or vehicle access to the Water Frontage of an Inland Waterway or other inland lake or Lake Michigan from land without Water Frontage." [(*Id.* at 117.)]

The residential site condominium units, however, will each have their own un-shared broadside mooring slip. (See *id.* at 536.) And the Township recognized that the 33-slip private marina is a Special Approval Use under Sections 40-1046 and 40-272 (12). (*Id.* at 538.)

At the April 26, 2017 meeting, the Planning Commission unanimously approved NorthShore's request for a Special Approval Use for a marina, and granted preliminary approval, with conditions, of NorthShore's proposed PUD. One of the conditions—which was specifically requested by the Coastal Alliance's members—was that the Planning Commission would retain

an outside planner from McKenna Associates ("Outside Planner") to review NorthShore's proposal and to advise the Planning Commission during the final approval stage. The Outside Planner applauded NorthShore's "conservation based" design approach to this PUD, noting that "[t]his design approach focuses the development to the interior of the property, where development has previously occurred, and results in the preservation of the topography and landscape in its natural state and contour on almost 50% of the property." (Ex B to NorthShore's COA Br, Case No. 346679.)

On October 23, 2017, the Planning Commission gave NorthShore final approval of its proposed PUD.

The Coastal Alliance appeals the preliminary approval

On June 30, 2017, the Coastal Alliance appealed the Planning Commission's preliminary approval to the ZBA.[4] The Coastal Alliance presented the affidavits of seven of its "members" in support of its claim that it is an aggrieved party—Ms. Birkholz (deceased), Ms. Bily-Wallace, Ms. Bily, Mr. Van Howe, Mr. Johnson, Mr. Engel, Mr. Deam, Mrs. Engel (11/30/17 AR 164-193). The Coastal Alliance alleged, among other things, that:

- the proposed boat basin will reduce the recreational use of the river due to increased boat traffic and safety concerns (Appl 22, 27; 11/30/17 AR 171, 178);
- the proposed boat basin will impact the aesthetic beauty and surrounding landscape on the Kalamazoo River (Appl 22; 11/30/17 AR 172-173);
- the proposed boat basin will impact the economic value of the property due to a change in viewshed and the character of the river (Appl 22);

[4] The Coastal Alliance initially appealed the Planning Commission's preliminary approval directly to the circuit court, but the circuit court dismissed the appeal because the Coastal Alliance had failed to exhaust its administrative remedies.

- the dredging of the boat basin and the associated laydown area will affect dunes, plants, and wildlife on nearby lands and will contribute to the risk of destabilization of the dune and erosion (Appl 23);

- the project will have negative aesthetic impacts to the members of the public that might be boating on Lake Michigan and the Kalamazoo River, or that are hiking in the State Park (Appl 27; 11/30/17 AR 184-187);

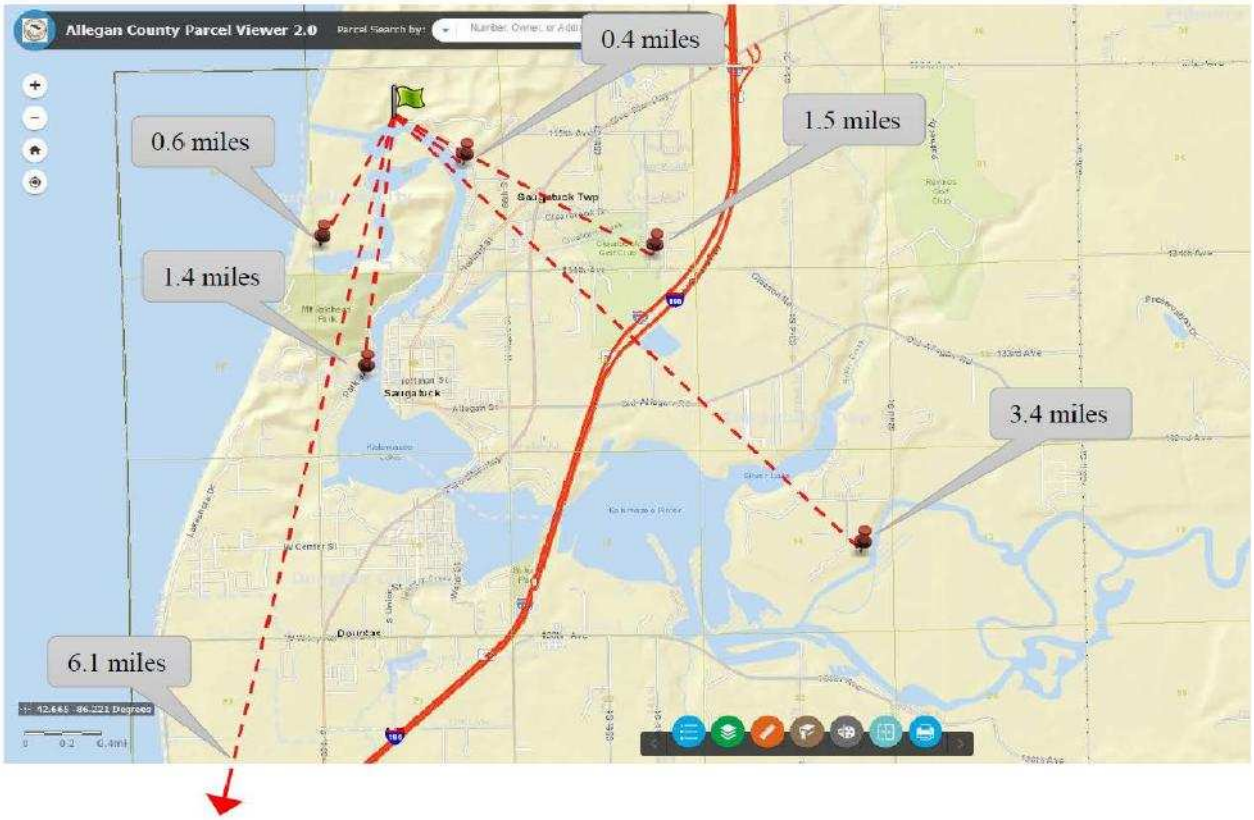
- the alleged environmental, aesthetic, and recreational harms may affect property values (Appl 27; 11/30/17 AR 191-193);

- construction of the boat basin will cause harm to local business owners that rely on the Kalamazoo River and its natural features (Appl 27; 11/30/17 AR 182-183); and

- the proposed boat basin will come within 200 feet of the Patricia Birkholz Natural Area and will threaten her legacy (Appl 26; 11/30/17 AR 164-165).

While some of these affiants, or the families of the affiants, do own (or did own) property within the Saugatuck/Douglas area, most of their properties are located at least half a mile from the mouth of the proposed boat basin.[5] The figure below shows approximately how far removed these affiants are from the proposed development:

[5] The addresses of these members are stated in the affidavits attached to the Coastal Alliance's initial appeal to the ZBA. The Allegan County GIS system was used to calculate the distances.



Even the cottage owned by the Bily family—the only family the Coastal Alliance claims meets the existing aggrieved-party standard—is almost a half mile away.

The allegations of harm from the development have remained virtually identical over the years, even though the Coastal Alliance claims that the previous development it opposed was "a completely different project" that is "vastly different" from the current plans. (Coastal Alliance's COA Br, Case No. 342588, p 2.) Specifically, in 2014, the Coastal Alliance opposed what it described as an "interior road project," in contrast to this current appeal which the Coastal Alliance refers to as a "boat basin project." Below is a table comparing the alleged harm the Coastal Alliance asserts these projects would cause:

"Interior Road Project"	"Boat Basin Project"
The road project "will do irreparable damage to the dune habitat." (Ex C to NorthShore's COA Br, Case No. 346679, at 18.)	The boat basin project "will do irreparable damage to the dune habitat." (7/9/18 Appellant's Trial Court Br, Case No. 18-059598-AA, at 19.)
The road project will "devastate the entire dunes ecological system." (Ex C to NorthShore's COA Br, Case No. 346679, at 18.)	The boat basin project will "devastate the entire dunes ecological system." (7/9/18 Appellant's Trial Court Br, Case No. 18-059598-AA, at 19.)
The road project "will have aesthetic impacts from not only Lake Michigan and [the] Kalamazoo River, but also the adjacent State Park." (Ex C to NorthShore's COA Br, Case No. 346679, at 18.)	The boat basin project "will have aesthetic impacts from not only Lake Michigan and [the] Kalamazoo River, but also the adjacent State Park." (7/9/18 Appellant's Trial Court Br, Case No. 18-059598-AA, at 19.)
The road project will "affect property values in the area" and "an increase in property taxes." (Ex C to NorthShore's COA Br, Case No. 346679, at 18.)	The boat basin project will "affect property values in the area" and "an increase in property taxes." (7/9/18 Appellant's Trial Court Br, Case No. 18-059598-AA, at 20.)
The road project will "affect recreational activities in the area." (Ex C to NorthShore's COA Br, Case No. 346679, at 18.)	The boat basin project will "affect recreational activities in the area." (7/9/18 Appellant's Trial Court Br, Case No. 18-059598-AA, at 19.)
The road project will "detract from the quality of adjacent public areas." (Ex C to NorthShore's COA Br, Case No. 346679, at 18.)	The boat basin project will "detract from the quality of adjacent public areas." (7/9/18 Appellant's Trial Court Br, Case No. 18-059598-AA, at 20.)
The road project "is inconsistent with the tri-community master plan." (Ex C to NorthShore's COA Br, Case No. 346679, at 18.)	The boat basin project "is inconsistent with the tri-community master plan." (7/9/18 Appellant's Trial Court Br, Case No. 18-059598-AA, at 20.)

On October 11, 2017, following a public hearing, the ZBA determined that the Coastal Alliance lacked standing to appeal the Planning Commission's approval, specifically finding that

Coastal Alliance did not adequately articulate "how it would suffer any special damage, different from the damage that would allegedly be sustained by the general public, with reference to the development of the subject real estate." (11/30/17 AR 841.)

On November 10, 2017, the Coastal Alliance appealed the ZBA's decision to the circuit court. On February 6, 2018, following briefing and oral arguments, the circuit court determined that the Coastal Alliance was not an aggrieved party under the MZEA and thus was not empowered to invoke the appellate jurisdiction of the circuit court. (2/6/18 Circuit Court Op, Case No. 17-58936-AA.)

On February 27, 2018, the Coastal Alliance filed a claim of appeal with the Court of Appeals.

The Coastal Alliance appeals the final approval

On December 7, 2017, the Coastal Alliance appealed the Planning Commission's final approval to the ZBA. On April 9, 2018, following a public hearing, the ZBA again determined that the Coastal Alliance lacked standing to appeal the Planning Commission's approval. Specifically, the ZBA held: "The SDCA has not been able to articulate how it would suffer any special damage, different from damage that would allegedly be sustained by the general public, with reference to the development of the subject real estate." (11/30/17 AR 82.)

On May 9, 2018, the Coastal Alliance appealed the ZBA's decision to the circuit court. The Coastal Alliance also added two original claims for declaratory relief and nuisance per se. On November 14, 2018, the circuit court again determined that the Coastal Alliance was not an aggrieved party under the MZEA and thus was not empowered to invoke the appellate jurisdiction of the circuit court. The court noted that "[t]here has been no showing of unique harm that this Court is aware of. Especially in light of the evidence that's been presented to support that this is an environmentally friendly project" (10/25/18 Hr'g Tr, Case No. 18-59598-AA, at 43),

and further stated that "the SDCA has not shown that they've suffered special damages not common to other property owners similarly situated" (*id.* at 45). The circuit court dismissed all of the Coastal Alliance's claims.

On December 5, 2018, the Coastal Alliance filed another claim of appeal with the Court of Appeals.

The Court of Appeals' decision

Both of the Coastal Alliance's appeals were subsequently consolidated by the Court of Appeals. On August 29, 2019, the Court of Appeals affirmed the circuit court's decisions dismissing the Coastal Alliance's appeals for failing to satisfy the aggrieved-party standard set forth in MCL 125.3606(1). Relying on the recent decision in *Olsen*, the Court of Appeals rejected the Coastal Alliance's assertion that the concepts of "standing" and "aggrieved party" are indistinguishable because "the aggrieved party analysis refers to 'other property owners similarly situated,' whereas the standing analysis refers to 'the citizenry at large.' " (COA Op 5.) The court went on to state that the Coastal Alliance "critically misapprehends the analysis by referring to injuries that differ 'from the public at large.' " (*Id.*) Specifically, the court held that the harms alleged in the Coastal Alliance's affidavits did not show that the affiants will suffer harms distinct from other similarly situated property owners because "all of the articulated concerns are either speculative, broad environmental policy matters, or pertain to harms that could be suffered by any neighbor, business, or tourist." (*Id.*) The court, therefore, affirmed the circuit court's determination that the Coastal Alliance was not an aggrieved party pursuant to MCL 125.3605.[6]

[6] The Court of Appeals also remanded the Coastal Alliance's original claims for declaratory judgment and nuisance per se, and directed the circuit court to address Coastal Alliance's standing to bring those claims and the substantive merits of those claims, as applicable. (COA Op 6.)

COUNTER-STATEMENT OF STANDARD OF REVIEW

This Court reviews de novo the grant or denial of a motion to dismiss an appeal for lack of jurisdiction. *S Dearborn Envtl Improvement Ass'n, Inc v Dep't of Envtl Quality*, 502 Mich 349, 360; 917 NW2d 603 (2018).

ARGUMENT

I. The issue of who can appeal a zoning board of appeals decision was decided by the Legislature in 2006 when it chose to incorporate the "aggrieved party" standard into the MZEA.

The Coastal Alliance urges this Court to grant its application primarily because it claims "Michigan law is in serious need of guidance from this Court as to who has standing to bring a zoning appeal." (Appl 1.) The Coastal Alliance contends that the definition of "aggrieved party" developed in the Court of Appeals a half-century ago is narrower than the definition applied in other jurisdictions and argues it should instead be expanded to the broader test for standing set forth in *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349; 792 NW2d 686 (2010). The Legislature, however, has already decided this issue, choosing to limit the pool of potential zoning appellants to those who suffer unique harms as a result of zoning decisions and that legislative decision. Because that decision is unreviewable, there is no question of jurisprudential significance to review.

To explain, the Coastal Alliance in particular takes issue with the Court of Appeals' holding in this case that an "aggrieved party" is defined as having "suffered some special damage not common to other property owners similarly situated." (COA Op 3.) The Court of Appeals' reference to the "property owners similarly situated" language comes from its recent published decision in *Olsen.* And *Olsen* did not establish new law; it coalesced the statutory text and well-established Michigan jurisprudence into a well-reasoned and instructive opinion. Indeed, for

every single ruling in *Olsen*, the Court of Appeals relied on prior published decisions interpreting the aggrieved-party language in the context of zoning appeals that have remained good law in Michigan for half of a century or more. See *Olsen*, 325 Mich App at 182-185 (relying on *Vill of Franklin*, 101 Mich App at 557; *Brink*, 81 Mich App 99; *Unger*, 65 Mich App at 617; *Joseph*, 5 Mich App at 571; and others). These decisions have consistently held that a party seeking to establish his or her status as a person aggrieved must allege and prove that he or she has suffered special damages not common to other property owners similarly situated. The Coastal Alliance's application directly attacks *Olsen* and the numerous published decisions on which it relied, asserting that this standard is not supported by the plain language or a reasonable interpretation of the MZEA.

This Court already concluded that this precise issue does not involve a legal principle of major significance to the state's jurisprudence when it denied leave in *Olsen* just six months ago. In that case, the appellees raised the nearly identical question of whether the Court of Appeals erred in creating a distinction between traditional-standing jurisprudence and the "comparable interest in an appellate context." The Coastal Alliance has not identified any new issues of jurisprudential significance that necessitate this Court's review.

Further, the Coastal Alliance's position that the Court of Appeals' long-standing interpretation of the "aggrieved party" standard contradicts the MZEA lacks merit. The Legislature deliberately chose to incorporate the term "party aggrieved" into the MZEA after that term of art had been imbued with significant meaning through its consistent judicial interpretation over the past half century. It should not be assumed that language chosen by the Legislature was inadvertent. *Bush v Shabahang*, 484 Mich 156, 169; 772 NW2d 272 (2009).

In fact, the statutory history of the MZEA evidences the Legislature's specific intent to adopt the "aggrieved party" standard to narrow who could appeal zoning boards of appeals decisions to Michigan circuit courts.[7] Prior to March 1, 1979, Michigan zoning enabling acts—including the now-repealed City and Village Zoning Act—used the "aggrieved party" standard to determine whether a party could invoke appellate jurisdiction in the zoning context. *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688, 697-698; 311 NW2d 828 (1981). The definition of "aggrieved party" applied in *Olsen* arose from the long-standing body of caselaw interpreting those zoning enabling acts.

In 1981, the Legislature amended these zoning enabling acts to use the more relaxed "interest affected" standard. *Id.* at 698. The Court of Appeals noted that "the Legislature's decision to amend the language of the provisions governing standing was in response to this Court's opinion in *Brink*, [81 Mich App 99]" and held that, unlike the stricter "aggrieved party" standard, even a showing of possible adverse effects on the appellants was sufficient to confer standing under the "interest affected" standard. *Brown*, 109 Mich App at 698-699.

However, in 2006, when the Legislature consolidated three previous zoning enabling acts for cities and villages, townships, and counties into the MZEA, *Whitman v Galien Twp*, 288 Mich App 672, 679; 808 NW2d 9 (2010), it reverted to the narrower "aggrieved party" language. When interpreting statutory language that previously has been subject to judicial interpretation, this Court presumes that the Legislature uses the words in the sense in which they have been

[7] This Court has consistently held that it is appropriate to review the pertinent historical context for a statutory scheme to determine the Legislature's intent. See *People v Gardner*, 482 Mich 41, 58; 753 NW2d 78 (2008) ("Some historical facts may allow courts to draw reasonable inferences about the Legislature's intent because the facts shed light on the Legislature's affirmative acts."); *Brown*, 109 Mich App at 698 ("Courts may look to the legislative history of an act, as well as to the history of the time during which the act was passed, to ascertain the reason for the act and the meaning of its provisions.").

previously interpreted. *People v Wright*, 432 Mich 84, 92; 437 NW2d 603 (1989). There is no reason to presume otherwise in this context. Given the statutory history and jurisprudence on point defining the term "aggrieved party" in the zoning context, it simply cannot be presumed that the Legislature was ignorant of how this legal term of art had come to be defined when it chose to reincorporate that term into the MZEA.

This Court need not second-guess the words that were carefully and deliberately chosen by the Legislature to govern who can appeal under the MZEA. *People v Harris*, 499 Mich 332, 352; 885 NW2d 832 (2016). Had the Legislature intended to create a broader category of zoning appellants than those traditionally classified as "aggrieved parties" under Michigan jurisprudence, it could have incorporated the broader "interested affected" standard, or the test for standing set forth in *Lansing Schools*. Instead, it chose the more narrowly defined "aggrieved party" standard, and presumably did so deliberately.

Overlooking all of this historical context, the Coastal Alliance contends that if the Legislature had intended to narrow the pool of potential zoning appellants to only property owners, it would have used the term "property owner" instead of "person." But there was no need for the Legislature to use the term "property owner" when the phrase "person aggrieved" already had a well-defined, narrow meaning in Michigan zoning jurisprudence.

The Coastal Alliance also seeks to persuade this Court with others states' interpretations of the language in their statutes governing zoning appeals. How other jurisdictions define the term is irrelevant at this point. The Michigan Legislature has already chosen the narrower "aggrieved party" standard for Michigan, and respecting that policy choice means faithfully applying the definition that the Legislature would have gleaned from the jurisprudence at the time that it made that policy decision.

This standard is neither circular nor impossible to apply. It simply requires a zoning appellant to demonstrate harms dissimilar (i.e., different in kind) from those experienced by other property owners within the same community. See, e.g., *Tobin v City of Frankfort*, No. 296504, 2012 WL 2126096, at *2 (Mich Ct App, June 12, 2012) (holding that one appellant alleged a specific injury unique to its parcel of property—namely, the significant filling of wetlands on both sides of its property—but ultimately concluding that those allegations had been mooted by updated development plans). This is why aesthetic changes, population increases, environmental impacts, and pecuniary harm do not suffice under the "aggrieved party" standard—because other property owners in the area will always share those harms to some degree. Allowing such harms to qualify would mean any member of the community who disliked the manner in which someone uses their land could appeal.

The Coastal Alliance tries to manufacture a reviewable issue by asserting that the *Olsen* court was inconsistent in its use of the terms "community members" and "property owners" when describing the standard for assessing an appellant's alleged harm in a zoning appeal. (Appl 14.) There is no evidence that the use of these terms has ever caused any confusion in the Court of Appeals or the lower courts. See *Olsen*, 325 Mich App at 183; *Joseph*, 5 Mich App at 571. In any event, this case does not present the proper vehicle for considering this issue because it has no bearing on the outcome of this case. The Court of Appeals here held that all of the Coastal Alliance's articulated concerns "are either speculative, broad environmental policy matters, or pertain to harms that could be suffered by *any nearby neighbor, business, or tourist.*" (COA Op 5 (emphasis added).) Because the Court of Appeals compared the harms alleged by the

Coastal Alliance to both property owners *and* community members more broadly, any distinction that might be drawn between these terms is ultimately irrelevant to the outcome of this case.[8]

In sum, the Coastal Alliance has identified no persuasive reason for this Court to grant leave to appeal from the unpublished decision below, especially when it cannot judicially impose a new standard for zoning appellants that is different from the one inherently adopted by the Legislature when it incorporated the "aggrieved party" concept into the MZEA.

II. The Court of Appeals correctly held that the Coastal Alliance has not suffered harms dissimilar to other similarly situated property owners or community members.

Not only has the Coastal Alliance failed to place any question of major jurisprudential significance before the Court, it has also failed to demonstrate any clear error in the Court of Appeals' application of Michigan law. To qualify as an "aggrieved" party in a zoning appeal, an appellant must show "a unique harm, dissimilar from the impact that other similarly situated property owners may experience." *Olsen*, 325 Mich App at 185. While the Coastal Alliance has certainly articulated its interest in "throttling the development" of the NorthShore Property, *Brink*, 81 Mich App at 105, it has not alleged and proved special damages that are dissimilar from the impact that other similarly situated property owners might experience.

In its Application, the Coastal Alliance alleges that only one family—the Bily family—meets the existing aggrieved party standard. (Appl 22.) Presumably, this is because the Bilys are the only Coastal Alliance member that owns property within a half mile of the NorthShore

[8] To be sure, the Court of Appeals declined to hold that the Coastal Alliance would not satisfy the standing requirements in a different context based on harms "distinct from the general public." (COA Op 5.) But it also explained that "a party generally cannot show a sufficiently unique injury from a complaint that 'any member of the community might assert.' " (See *id.* (quoting *Olsen*, 325 Mich App at 193).) It then made clear that the Coastal Alliance did not satisfy this latter standard because the harms alleged were similar to those that any "nearby neighbor, business, or tourist" could assert. (See *id.*)

property. The Coastal Alliance asserts that the proposed development "would reduce the family's recreational use of the river due to increased boat traffic and safety concerns; would impact the aesthetic beauty and surrounding landscape of the Bily property on the Kalamazoo river; and would impact the economic value of the property due to a change in viewshed and the character of the river." (*Id.*) The Coastal Alliance appears to believe that the harms to the Bilys are somehow dissimilar because the Bilys are closer to the NorthShore Property than other similarly situated property owners (although they are still almost a half mile away). But this is a difference in degree, not in kind. Even an appellant's status as an abutting landowner does not relieve the appellant from establishing special damages are that are unique from other property owners similarly situated. *Vill of Franklin*, 101 Mich App at 557-558; *Brink*, 81 Mich App at 103 n 1.

For instance, as to the Bilys' concern that the development would reduce the family's recreational use of the river, the same could be true for any person hiking in the state park, floating down the Kalamazoo River, or boating on Lake Michigan. As the circuit court has previously noted, "the waters of Lake Michigan and the Kalamazoo river [are] shared by the community at large and not a special interest." (2/6/18 Circuit Court Op, Case No. 17-58936-AA, at 4.) The Coastal Alliance has not demonstrated how the Bilys would suffer "special damages" that others engaging in any of these activities would not.

Likewise, with regard to the Bilys' aesthetic[9] and economic concerns, any property owner in the area could assert the same purported harms. In addition, the Bilys' economic claim

[9] Not only are the Coastal Alliance's aesthetic concerns insufficient under the law, but they are also unsupported by the facts in this matter. The setting of the Bilys' cottage is not as serene as the Coastal Alliance's brief or their affidavits would suggest. To the contrary, their cottage is directly next door to Pine Trail Camp, which hosts week-long summer camps; weekend retreats in the fall, winter, and spring; and family camps throughout the year. (See Ex I to NorthShore's COA Br, Case No. 346679.) The camp's dock, from which teenage campers daily launch kayaks and paddle boards, is located immediately adjacent to the Bily cottage. A row of camp

is nothing but unsubstantiated conjecture which the Court of Appeals has rejected as insufficient. There is no evidence in the record that a change in the viewshed—which would also occur if NorthShore decided to build residential homes on the property without obtaining approvals—would negatively impact the Bilys' property.

It is for precisely these reasons that the Court of Appeals correctly held that "all of the articulated concerns are either speculative, broad environmental policy matters, or pertain to harms that could be suffered by any nearby neighbor, business, or tourist." (COA Op 5.) These are the exact types of harms the Court of Appeals has long held are insufficient to confer "aggrieved party" status because they are not unique harms different from other property owners similarly situated.

III. The Coastal Alliance's alleged harms do not even arise from the zoning decisions at issue—a jurisdictional prerequisite—which makes this case a poor vehicle for reaching the issues above.

Regardless of what interest there may be in the issues above, this appeal is a poor vehicle for resolving those issues because they do not affect the outcome of this appeal. To be an aggrieved party, the alleged harm must not only be dissimilar to other similarly situated property owners but must also arise from the zoning decision appealed, "rather than injury arising from the underlying facts of the case." *Olsen*, 325 Mich App at 181 (quoting *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291-292; 715 NW2d 846 (2006)). The harms alleged by the Coastal Alliance do not arise from the zoning decisions themselves but instead arise from any development of the property, regardless of what zoning approvals would be granted. Because

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dormitories/cabins is also located right next to the Bily cottage— the closest of which is only 30 feet or so away. (See Ex G to NorthShore's COA Br, Case No. 346679.) And, the east side of the Kalamazoo River directly south of the Bilys' cottage is lined with upwards of 30 cottages and boat docks, yet they are "devastated" by the potential construction of 23 homes almost a half mile away.

that jurisdictional requirement for invoking the circuit court's appellate jurisdiction is entirely lacking, the outcome of this case does not change no matter how the issues discussed above would be resolved.

"It is a general rule in this state and elsewhere that only a party aggrieved by a decision has a right to appeal from that decision." *Ford Motor Co v Jackson*, 399 Mich 213, 225; 249 NW2d 29 (1976). This rule is not particular to zoning appeals. In other contexts, "[t]he only difference [between standing on appeal and ordinary standing] is a litigant on appeal must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment rather than an injury arising from the underlying facts of the case." *Id.* The requirement that an appellant must be aggrieved by the decision appealed is so essential to the nature of appellate review that it is a jurisdictional prerequisite. See MCR 7.203(A); *Olsen*, 325 Mich App at 181.

The Coastal Alliance's alleged harms arise from the development itself, i.e., the underlying facts of the case, and not from the Planning Commission's decision to grant the PUD and Special Approval Use. The Coastal Alliance asserts that the proposed development "would reduce the [Bily] family's recreational use of the river due to increased boat traffic and safety concerns; would impact the aesthetic beauty and surrounding landscape of the Bily property on the Kalamazoo river; and would impact the economic value of the property due to a change in viewshed and the character of the river." (Appl 22.) But all of these alleged impacts could also occur if NorthShore developed the area as allowed under the Zoning Ordinance without obtaining any special approvals from the Planning Commission.

The NorthShore property is zoned R-2, Riverside Residential District, meaning that NorthShore could develop residential homes with waterfront access without obtaining any special approvals from the Planning Commission. Under the Saugatuck Township Zoning

Ordinance, within the same footprint as the PUD and Special Approval Use occupies, NorthShore could have developed 33 residential home sites (Section 40-275) and 48 boat slips (Section 40-908) by right, without obtaining any special approvals from the Planning Commission.[10] (11/30/17 AR 34, 92-96, 121.) In contrast, NorthShore's PUD and Special Approval Use will contain 23 residential-home sites and 50 boat slips.[11] The harms allegedly suffered by the Coastal Alliance would not be meaningfully different if NorthShore developed the property with no zoning approvals. The Coastal Alliance's alleged harms therefore arise from the fact that the property is being developed, not from the particular zoning approvals being appealed. *Olsen*, 325 Mich App at 181.

The same is true of the generalized concerns raised by all of the other Coastal Alliance affiants, which include: safety concerns resulting from increased boating traffic, damage to the aquatic habitat due to dredging, and economic interests due to changes in the recreational and aesthetic values of the area. (Appl 26.) All of these alleged harms would occur even if the property were developed without the PUD and marina approvals, and therefore arise from the fact that the property is being developed, not from the particular zoning approvals being appealed.[12]

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[10] This calculation of "by right" boat slips does not take into account the additional water frontage that NorthShore's property has on the Kalamazoo River both to the east and west of the PUD footprint.

[11] The PUD mechanism simply allows for flexibility in laying out the development. Rather than having residential homes evenly spaced throughout the development on large lots, the PUD allows for the homes to be placed in a more compact layout and the open space to be consolidated while keeping the same overall density.

[12] This conclusion is supported by the fact that the Coastal Alliance's alleged harms are virtually identical to those alleged by the Coastal Alliance in 2014 regarding a proposed interior road project that the Coastal Alliance described as "vastly different" from the current plans (see comparison table on page 10 above).

The other concern raised by the Bilys—impacts resulting from dredging and the laydown yard—are directed at the wrong governmental entity. This appeal arises from the Township's approval concerning *use* of the land—i.e., the development of a site condominium and special approval of a marina. It is EGLE and the United States Army Corps of Engineers that regulate whether and how the boat basin may be dredged, not the Township. In fact, the Township expressly conditioned its Special Approval Use on NorthShore obtaining the necessary approvals to dredge the boat basin from other entities:

> [The applicant] shall obtain all required state and federal permits and approvals to construct the boat basin, including, without limitation, any that are needed from the United States Army Corps of Engineers (USACE), the United States Environmental Protection Agency (USEPA), and the Michigan Department of Environmental Quality (MDEQ). [11/30/17 AR 617.]

Similarly, the laydown area is not part of the PUD that was approved by the Planning Commission. As noted above, the PUD only comprises a small portion of the NorthShore property. (See Ex A to NorthShore's COA Br, Case No. 346679.) More than 250 acres of NorthShore's property are not part of the PUD being appealed. It should not be surprising that there are a number of earthmoving activities occurring on the NorthShore property that are not part of the PUD. The placement of sand in the laydown area is one such activity that is occurring on a portion of the NorthShore property but not within the PUD. (See 11/30/17 AR 506, 539.) The Coastal Alliance's complaints about the dredging and laydown yard have no real connection to the Township's approval of the PUD and the Special Approval Use.

Finally, the Coastal Alliance's reliance on *Kallman v Sunseekers Prop Owners Ass'n, LLC*, 480 Mich 1099; 745 NW2d 122 (2008); and *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007), *overruled by Lansing Schools*, 487 Mich 349, is misplaced. First, these decisions have nothing to do with the

aggrieved-party test. And second, even if these decisions suggest that the Coastal Alliance's alleged harms would be sufficient under the general-standing test adopted in *Lansing Schools*, under the MZEA and general appellate law, the Coastal Alliance would still need to demonstrate that these harms arise out of the zoning decisions appealed. It simply cannot make that showing.

In sum, even if this Court rejected the Court of Appeals' interpretation that "aggrieved party" means an appellant that suffers unique harms different from "other similarly situated property owners," the Coastal Alliance's alleged aesthetic, recreational, or economic harms do not establish that the Coastal Alliance is aggrieved by the zoning approvals that it has appealed rather than just the development of the NorthShore property in general. Because the Coastal Alliance cannot satisfy that jurisdictional prerequisite, the separate issues it has raised in its application lack significance not only to the jurisprudence of the state but also to the outcome of this case.

CONCLUSION AND REQUESTED RELIEF

Michigan law does not permit property owners to use the zoning-appeal process as a sword for striking down developments they dislike, even if the development incidentally affects their interests. It only allows property owners to use the zoning appeal as a shield against unique harms that arise from the particular zoning decision appealed. This is the standard embodied in the term "aggrieved party," which the Legislature deliberately adopted for the MZEA, after nearly half a century of judicial interpretation. Whether to now expand the definition of that term is not an issue that deserves this Court's review, not only because the issue has already been decided by the Legislature, but also because there is no merit in the Coastal Alliance's claim that it is harmed by the decisions it appealed. Its only concern is to prevent any development of NorthShore's property; that is not a sufficient basis for invoking judicial review of the zoning

approvals at issue. The ZBA, the circuit court, and the Court of Appeals all correctly determined that the Coastal Alliance is not "aggrieved" by the Planning Commission's decisions. For these reasons, the Court should deny review.

Respectfully submitted,

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